LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 26 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

***

No. 598

***

EUGENE MONROE VANCE, *Petitioner*,

vs.

STATE BOARD OF HAIRDRESSERS AND COSMETOLOGISTS, *Respondent*

***

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS ELEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS AT EASTLAND

***

DAN M. FERGUS,
P. O. Box 1479
Abilene, Texas 79604

H. L. HAYS, JR.,
P. O. Box 5025
Abilene, Texas 79605

Counsel for Petitioner.

ABILENE PTG. & STATIONERY CO.

TABLE OF CONTENTS

	Page
Opinions Below	1, 2
Jurisdiction	2, 3
Questions Presented for Review	3, 4
Statutes Involved	4-6
Constitutional Provisions Involved	6, 7
Statement of the Case	7-14
Reasons for Granting the Writ	14-32
Conclusion	32

Appendix:

Exhibit A	1a, 2a
Exhibit B	3a, 4a
Exhibit C	5a-9a
Exhibit D	10a, 11a
Exhibit E	11a-13a

Table Of Authorities

Cases — Page

Aetna Ins. Co. vs Kennedy, 301 US 389, 393, 81 L Ed 1177, 1180, 57 S Ct 809 27

Avery vs Alabama, (1940) 308 US 444, 84 L Ed 377, 60 S Ct 321 17

Bagless vs Johnston, (1943) DC Cal 88 Supp 758 19

Behrens vs Hironimus, (1948) CCA W.Va. 166 F 2d 245 19

Betts vs Brady, 316 US 455, 86 L Ed 1595, 62 S Ct 1252 15

Bute vs Illinois, (1948) 833 US 640, 92 L Ed 986, 68 S Ct 763 ..... 16, 28

Carnley vs Cochran, (1962) 369 US 506, 8 L Ed 2d, 82 S Ct 884 28

Carter vs Illinois, (1946) 329 US 173, 91 L Ed 172, 67 S Ct 216 16

De Meeler vs Michigan, (1947) 329 US 663, 91 L Ed 584, 67 S Ct 596 17

Evans vs Rives, (1942) 75 US App D.C. 242, 126 F 2d 633, 638 23

Ferguson vs Georgia, 365 US 570, 5 L Ed 2d 738, 81 S Ct 756 24

Foster vs Illinois, (1947) 332 US 134, 91 L Ed 1955, 67 S Ct 1716 16

Frank vs Margum, 237 US 327, 59 L Ed 980, 35 S Ct 582 18

Gibbs vs Burke, (1949) 337 US 773, 93 L Ed (Adv 1343), 69 S Ct 1247 ..... 20, 28

Gideon vs Wainwright, (1963) 372 US 335, 9 L Ed 2d 799 at 799 & 803, 83 S Ct 792 ..... 14, 20, 23, 25

TABLE OF AUTHORITIES

continued, page 2

Cases	Page
Griffin vs Illinois, 351 US 12, 100 L Ed 891, 76 S Ct 585, 55 ALR 2d 1055	24
Hamilton vs Alabama, 368 US 52, 7 L Ed 2d 114, 8 S Ct 157	24
Harvey vs Mississippi, (1965) 340 F 2d 263	22
Hawk vs Olson, (1945) 326 US 271, 90 L Ed 61, 66 S Ct 116	20
Hodges vs Easton, 106 US 408, 412, 27 L Ed 169, 171, S Ct 307	27
Johnson vs Zerbst, (1938) 304 US 458, 82 L Ed 1461 58 S Ct 1019, 146 ALR 357	15, 18, 19, 27, 29, 30
Kinsella vs United States, (1960) 361 US 234, 4 L Ed 2d 268, 80 S Ct 297	24
Kuczynski vs United States, (1945) CCA Ind. 149 F 2d 478	19
C. J. Moore vs Michigan, 335 US 155, 160, 161, 2 L Ed 167, 78 S Ct 191, 8 L Ed 2d	28
Nobler vs Eicher, (1944) 143 F 2d 1001, 79 US App DC 217	19
Nortner vs Hiatt, (1940) DC PA 33 F Supp 545	19
Ohio Bell Telephone Co. vs Public Utilities Co., 301 US 292, 307, 81 L Ed 1093, 1103, 57 S Ct 724	26, 27
Powell vs Alabama, (1932) 287 US 45, 77 L Ed 158, 53 S Ct 55, 84 ALR 527	15, 17, 25

TABLE OF AUTHORITIES

continued, page 3

Cases — Page

Rice vs Olson, (1945) 324 US 786, 89 L Ed 1367, 65 S Ct 989 ..... 16, 19, 20, 21, 29

Thompson, vs King, (1939) CCA Mo., 107 F 2d 307 19

Townsend vs Burke, (1948) 334 US 736, 92 L Ed 1690, 68 S Ct 1252 16

United States vs Levine, (1955) DC Mass 127 F Supp 651 19

United States vs Morgan, (1954) 346 US 502, 98 L Ed 248, 74 S Ct 247 19

Uveges vs Pennsylvania, (1948) 335 US 437, 93 L Ed 127, 693 S Ct 184 ..... 16, 17, 24, 27, 29

van Moltke vs Gillies, (1948) 332 US 708, 92 L Ed 309, 68 S Ct 316 ..... 19, 28

Williams vs Kaiser, (1945) 323 US 471, 89 L Ed 398, 65 S Ct 363 17

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S.C.A., Const. Amend. No. 6, p. 4 6

U.S.C.A., Const. Amend. No. 14, p. 288 7

Vernon's Texas Penal Code, Art 527 509 Section 1 ..... 4, 5

Vernon's Texas Penal Code, Art 734 b, Section 10, 11 ..... 5, 6

MISCELLANEOUS

Right to Counsel, 93 L Ed 148 Anno. 19

9 L Ed 2d at 1261 Anno. 26

IN THE

Supreme Court of the United States

***

No.....

***

EUGENE MONROE VANCE, *Petitioner*,

vs.

STATE BOARD OF HAIRDRESSERS AND COSMETOLOGISTS, *Respondent*.

***

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS ELEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS AT EASTLAND

***

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Petitioner, Eugene Monroe Vance, prays that a writ of certiorari issue to review the judgment of The Court of Civil Appeals of Texas entered in on 25 February 1966, in the above entitled case, and the denial on 25 March 1966, of petitioner's motion for rehearing.

OPINIONS BELOW

The judgments of the County Court at Law of Taylor County, Texas, and of the District Court of

Taylor County, Texas, 104th Judicial District are not reported. A copy thereof is attached hereto in the Appendix as Exhibit A and B, and also appears in the Transcript of Record (R. I) The opinion of the Court of Civil Appeals, Eleventh Supreme Judicial District of Texas is reported in 400 S W 2nd 954, and appears in the Transcript of Record (R. II), and is attached hereto in the Appendix as Exhibit C. The judgment of the latter Court of Civil Appeals overruling Petitioner's Motion for Rehearing is noted in the printed record, 400 S W 2nd 954, appears in the Transcript of Record (R. II), and also is attached hereto in the Appendix as Exhibit D. The judgment of the Supreme Court of Texas, refusing Petitioner's Application for Writ of Error and the Order overruling Petitioner's Motion for Rehearing is not reported and a copy is attached in the Appendix as Exhibit E and also appears in the Transcript of Record (R. II).

JURISDICTION

The jurisdiction of this Court is invoked under 28 USCA 1257 (3).

. This is a case where the Petitioner pleaded guilty in the Taylor County Court at Law to a misdemeanor criminal offense (judgment dated and entered May 21, 1964) without having been offered or afforded counsel. Whereupon the State Board of Hairdressers and Cosmetologists entered an Order dated February 4, 1965, revoking his license to operate and instruct in the practice of hairdressing and cosmetology, based upon such conviction. Petitioner had a trial de novo in the District Court of Taylor County, 104th Judicial Dis-

trict of Texas, asking that the Order of the State Board be revoked and his license reinstated and showed by his verified pleadings, which were not denied and were uncontroverted, that the judgment of the Taylor County Court at Law was void for lack of jurisdiction because of the failure to afford or offer him counsel prior to and during the trial.

The District Court, judgment dated and entered, on June 11, 1965, granted Motion for Summary Judgment of Defendant, State Board, and ordered that the Board's Order of February 4, 1965, revoking Plaintiff's license, be in all things sustained. Petitioner then appealed to the Court of Civil Appeals, Eleventh Supreme Judicial District of Texas which, judgment dated and entered, on February 25, 1966, affirmed the judgment of the District Court and overruled Petitioner's Motion for Rehearing, judgment dated and entered on March 25, 1966. Petitioner appealed to the Supreme Court of Texas, making application for a Writ of Error which was refused, judgment dated and entered on May 25, 1966, and later overruled a Motion for Rehearing, dated and entered, on June 29, 1966.

QUESTIONS PRESENTED FOR REVIEW

1. When a man pleads guilty to a criminal charge—without having been afforded or offered the right to counsel—is not due process denied under the Sixth and Fourteenth Amendments to the Constitution of the United States?

2. Since the right to counsel has been held an essential jurisdictional prerequisite in federal criminal trials should not that jurisdictional prerequisite also

apply in the criminal trials of State Courts?

3. When a man collaterally attacks the judgment of a lower Court—by pleading failure of the lower Court to afford or offer counsel in his verified but uncontroverted and undenied pleadings—is not the judgment of the lower Court void for the lack of jurisdiction?

4. Should not a misdemeanant in a state criminal trial be afforded or offered the right to counsel when his liberty was at stake and, as a result of his non-intelligent and uninformed plea of guilty, his license to practice and instruct in hairdressing and cosmetology was thereby revoked by the State Board of Hairdressers and Cosmetologists?

5. Can there be an intelligent waiver of right to counsel—implied by a plea of guilty—when made by a man untrained in the law and without an apprehension of all other facts essential to a broad understanding of the whole matter?

6. When a judgment in a criminal case recites that Appellant "After being duly admonished of the consequence***by the Court, pleaded guilty to the charge" does that infer the right to counsel had been offered or afforded or that there had been an intelligent waiver of the right?

STATUTES INVOLVED

Art. 527 509 ACTS INVOLVING OBSCENE ARTICLES, OBJECTS AND MATERIALS; FINES AND PENALTIES; EXEMPTIONS

Section 1. Whoever shall knowingly photograph, act

in, pose for, model for, print, sell, offer for sale, give away, exhibit, televise, publish, or offer to publish, or have in his possession or under his control, or otherwise distribute, make, display, or exhibit any obscene book, magazine, story, pamphlet, paper, writing, card, advertisement, circular, print, pictures, photograph, motion picture film, image, cast , slide, figure, instrument, statue, drawing, phonograph record, mechanical recording, or presentation, or other article which is obscene, shall be fined not more than One Thousand Dollars ($1,000) nor imprisoned more than one (1) year in the county jail or both. (1 VTPC Art 527 Sec. 1)

Art. 734b GROUNDS FOR REFUSING, SUSPENDING OR REVOKING LICENSE

Section 10. The Board may refuse to issue or to renew or may suspend or revoke any license issued in accordance with the provisions of this Act for the following reasons:

(c) Conviction of any misdemeanor involving immoral conduct.

CONVICTION AS CONDITION OF REFUSAL TO RENEW, SUSPENSION OR REVOCATION; HEARINGS; APPEAL

Section 11 (a). "... the Board may suspend or revoke any such certificate of license or registration after giving the person so convicted at least twenty (20) days written notice of time and place of hearing before the Board for such purpose."

(b) . . . "If the Board suspends, revokes or refuses to issue or renew such license at said hearing, then such person may file suit to prevent same or to appeal from said order, and be entitled to a trial de novo, as such term is commonly used and intended in an appeal from the Justice Court to the County Court; and it is expressly provided that in such appeals on a trial de novo that the "substantial evidence rule" shall not apply, and which appeal shall be taken in any District Court of the County in which the person whose license is involved, resides." (2 VTPC Art 734b, Sec. 10, 11 (a) (b))

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional Provisions under which this case arises and are controlling are:

1. AMENDMENTS, ARTICLE VI.

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature of the cause of the accusation; to be confronted with witnesses against him; to have the compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."
>
> (USCA Const. Amend No. VI, p. 4)

2. AMENDMENTS, ARTICLE XIV, SECTION 1.

"All persons who are born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the priviliges or immunities of the citizens of the United States nor shall any State deprive any person of life, liberty or property, without due process of law: nor deny to any person within its jurisdiction the equal protection of the law."

(USCA Const. Amend. No. XIV, p. 288)

STATEMENT OF THE CASE

Eugene Monroe Vance, Petitioner, was convicted in Cause No. 10,158 on 21 May, 1964, *The State of Texas* vs *Eugene Monroe Vance*, in the County Court at Law, Taylor County, Texas, for the misdemeanor offense of "Possession of Lewd Literature", Article 527, 509, *Vernon's Texas Penal Code*. (R. I, p. 13, 14 & 15; Appendix, Exhibit A, p. 2a) Petitioner was convicted upon his plea of guilty. (R. I, p. 13; Appendix, Exhibit A, p. 2a) The Order of the County Court at Law sentenced him to pay a fine of One Hundred Dollars ($100.00) and committed him forthwith to the jail of Taylor County, Texas, until such fine and costs were paid.

On 4 February 1965, Respondent by it's Order revoked Petitioner's license to instruct and practice hairdressing and cosmetology (R. I, p. 9, 10, 28; Appendix, Exhibit B, p. 3a, 6a). In accordance with the *terms of article 734 b, Sec. 10 (c), Vernon's Texas Criminal Code*, Section 11 (b) of the statute provides:

> "If the Board suspends, revokes or refuses to issue or renew such license at said hearing, then such person may. . .appeal from said Order and be entitled to a Trial de Novo. . . and which Appeal shall be taken in any District Court of the County in which the person whose license is involved, resides."

Such appeal was brought within 20 days, as required, under Cause No. 10,282 B, in the District Court at Taylor County, Texas, 104th Judicial District. (R. I, p. 29; Appendix, Exhibit B, p. 4a)

This suit in the District Court was begun by Petitioner's Original Petition (R. I, p. 3,4) and followed by Respondent's Answer, both unverified. (R. I, p. 8) Thereafter Petitioner filed what he designated his Second Supplemental Petition, but what was in fact his Second Amended Original Petition. (R. I, p. 23, 24, 25; 400 SW 2d at p. 956; Appendix, Exhibit C, p. 7a) (At this stage, in the District Court i. e., the Court of first instance, Petitioner, by his pleadings introduced the Federal Questions sought to be reviewed.) In this latter pleading which was verified Petitioner alleged:

> "Plaintiff would further show the Court that at no time prior to his supposed conviction in Cause No. 10,158 of the County Court at law, Taylor County, Texas styled '*The State of Texas* vs *Eugene Monroe Vance*', was he offered legal counsel to represent him, nor was he afforded legal counsel prior to or during the trial in said cause; nor was he advised as to the consequence of his conviction in said cause and that the Plaintiff is not an attorney and did not know all of the consequences of said conviction and therefore, such conviction

> was invalid and completely void and the action taken by the Defendant in revoking his instructor's license No. 773 and operator's license No. 65-53245, was invalid and void and without any force and effect under the Sixth and Fourteenth Amendments to the Constitution of the United States of America." (Appendix, Exhibit C. p. 7a)

Prior to the filing of Petitioner's last pleading, Respondent filed a Motion for Summary Judgment. (400 SW 2d at 956; R. I, p. 11, 12; Appendix, Exhibit C, p. 8a) On the same day, Petitioner filed his last amended pleading. He filed his "Supplemental Answer to Defendant's Motion for Summary Judgment and Plaintiff's Motion for Summary Judgment." In this intrument, Appellant alleged, as follows:

> "...is invalid and void and without any force and effect because Eugene Monroe Vance was not offered legal counsel prior to or during the trial of said cause, nor was he advised as to the consequences of his conviction in said cause, in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States of America, as shown by Plaintiff's Second Supplemental Petition, sworn to by the Plaintiff, on file herein, and made a part hereof for all purposes." (400 SW 2d at 956; R. I, p. 19, 20; Appendix, Exhibit C. p. 8a)

There was no verified denial by Respondent, in any form, of the sworn allegations that Petitioner had been denied counsel. The District Court heard argument of counsel on the entire cause and overruled Petitioner's Motion for Summary Judgment and granted that of

Respondent. (R. I, p. 28, 29; Appendix, Exhibit B, p. 3a, 4a)

Hearing on Motion for Summary Judgment by both parties was had in the District Court on 11 June 1965. (R. I, p. 28, 29; Appendix, Exhibit B, p. 3a & 4a) Motion for Summary Judgment of the Defendant (Respondent) was granted, and the Respondent's Order of 4 February 1965, revoking Petitioner's license to instruct in and practice cosmetology in the State of Texas was in all things sustained, and Motion for Summary Judgment of Petitioner was denied. Petitioner gave notice of appeal to the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas. (R. I, p. 28, 29; Appendix, Exhibit B, p. 4a)

The District Court in its judgment (R. I, p. 28, 29) stated:

> "... the Court having considered the Pleadings, Affidavits and other documents on file, and having heard argument of counsel thereon. . ." (R. I, p. 28; Appendix, Exhibit B, p. 3a)

and forthwith sustained Respondent's Motion for Summary Judgment. However, at no time during said hearing did the Respondent by his counsel *controvert nor reply to* the "Sworn pleadings of Petitioner, or to the argument of Petitioner's counsel pertaining to such sworn pleadings." (400 SW 2d at 956; R. I, p. 23, 24, 25; Appendix, Exhibit B, p. 3a & 4a)

The judgment of the District Court was appealed by Petitioner to the Court of Civil Appeals, Eleventh Supreme Judicial District of Texas.

In the judgment, No. 4027, of the Court of Civil Appeals, 400 SW 2d 954 at 956, there is quoted Petitioner's Point of Error which is stated as follows:

> "The Trial Court erred in overruling Appellant's Motion for Summary Judgment, and in sustaining Appellee's Motion for Summary Judgment; because Appellant's conviction in the County Court at Law, Taylor County, Texas, was void in that Appellant was not advised of his right to legal counsel to represent him prior to, and during the trial, nor was he advised of the consequences of his conviction in said cause. All of which is in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States of America." (400 SW 2d at 956; R. II, p. 1-4; Appendix, Exhibit C, p. 6a, 7a)

The above Point of Error preserved Petitioner's claim as to violation of the Sixth and Fourteenth Amendments of the United States of America and in which the Federal Questions sought to be reviewed were raised. (Such point of error was presented by Petitioner in his Appellant's Brief before said Court) In like manner the Court in it's judgment quoted as follows:

> "Appellant contends that the plea of guilty and judgment of conviction based thereon are nullities and absolutely void. In this connection Appellant filed a verified pleading in which he alleged:
>
> > 'Plaintiff would further show the Court that at no time prior to his supposed conviction in Cause No. 10,158 of the County Court at Law, Taylor County,

> Texas, styled *'The State of Texas* vs *Eugene Monroe Vance'*, was he offered legal counsel to represent him nor was he afforded legal counsel prior to, or during the trial in said cause, nor was he advised as to the consequence of his conviction in said cause, and that the Plaintiff is not an attorney and did not know all of the consequences of said conviction and therefore, such conviction was invalid and completely void and the action taken by the Defendant in revoking his instructor's license No. 773 and operator's license No. 65-53245, was invalid and void and without any force and effect under the Sixth and Fourteenth Amendments to the Constitution of the United States of America.' " (ibid., Appendix, Exhibit C, p. 7a)

"Appellant also filed a Supplemental Answer to Defendant's Motion for Summary Judgment and a Motion for Summary Judgment in his favor in which he alleged, concerning the judgment of conviction against him, that it:

> '. . .is invalid and void and without any force and effect because Eugene Monroe Vance was not offered legal counsel to or during the trial of said cause, nor was he advised as to the consequence of this conviction in said cause, in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States of America, as shown by Plaintiff's Second Supplemental Petition, sworn to by the Plaintiff on file herein, and made a part hereof for all purposes.' " (ibid., Appendix Exhibit C, p. 8a)

The judgment of the Court of Civil Appeals passed upon Petitioner's pleadings in the following manner:

> "The judgment of conviction in the County Court at Law is valid upon its face and does not disclose the alleged defect urged by Appellant. The judgment recites that Appellant, 'after being duly admonished of the consequence. . .by the Court, pleaded guilty to the charge. . .' Appellant seeks to avoid the Order of the State Board of Hairdressers and Cosmetologists by collaterally attacking, in a Civil Court, the criminal conviction rendered against him which is not shown to be invalid upon its face. Such a collateral attack on that judgment is not permissible unless the judgment is void and not merely erroneous in such a way as to be voidable." (ibid., Appendix Exhibit C, p. 8a)

The Court of Civil Appeals held against Petitioner with the following language:

> "In our opinion, the judgment of conviction against Appellant was not void. The Court, therefore, did not err in overruling Appellant's Motion for Summary Judgment and in granting the Motion of Appellee for a Summary Judgment. Appellant's Point of Error is overruled."
>
> "The Judgment is affirmed." (400 SW 2d 954 at 956; R. II, p. 3; Appendix Exhibit C, p. 9a)

Petitioner presented his Motion for Rehearing, No. 4027, to the Court of Civil Appeals, Eleventh Judicial District of the State of Texas and the same was over-

ruled and the Order entered on March 25, 1966. (400 SW 2d 954; R. II, p. 5; Appendix Exhibit D, p. 10a)

Petitioner presented his Application for Writ of Error, No. A-11,436, to the Supreme Court of Texas, which was refused on May 25, 1966. Petitioner presented his Motion for Rehearing, A-11,436, to the Supreme Court of Texas, which was overruled on June 29, 1966. (R. II, p. 7; Appendix Exhibit E, p. 11a, 12a)

REASONS FOR GRANTING THE WRIT

1. When a man pleads guilty to a criminal charge—without having been afforded or offered the right to counsel—is not due process denied under the Sixth and Fourteenth Amendments to the Constitution of the United States?

The right to counsel has been established according to the Sixth Amendment to the Constitution of the United States, wherein it is mandatory upon Federal Courts and is made obligatory upon the States by the Fourteenth Amendment. (Gideon vs Wainwright, 312 US 335, 9L Ed 2d 799 at 799 & 803, 83 S Ct 792)
In the Gideon case, Mr. Justice Black, in delivering the opinion of the Court stated:

> "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." (ibid., 9L Ed 2d 799 at 805)

This Court held in Gideon vs Wainwright 372 US

335, 9 L Ed 2d 799 at p. 802, 803, 804 & 806, 83 S Ct 792, 93 ALR 733, as follows:

> "The Sixth Amendment provides, 'In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of Counsel for his Defence.' We have construed this to mean that in Federal Courts counsel must be provided for Defendants unable to employ counsel unless the right is completely and intelligently waived." (Johnson vs Zerbst, 304 US 458, 82 L Ed 1461, 58 S Ct 1019, 146 ALR 357) (1938)
>
> "We think the Court in Betts" (Betts vs Brady, 316 US 455, 86 L Ed 1595, 62 S Ct 1252) "had ample precedence for acknowledging that those guarantees of the Bill of Rights which are a fundamental safeguard of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment."

This same principle was recognized, explained and applied in Powell vs Alabama, 287 US 45, 77 L Ed 158, 53 S Ct 55, 84 ALR 527 (1932).

> "We accept Betts vs Brady's assumption, based as it was on our prior cases, that a provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the State by the Fourteenth Amendment. We think the Court in Betts was wrong, however, in concluding the Sixth Amendment's guarantee of counsel is not one of these fundamental rights."
>
> "The Court in Betts vs Brady departed from

the sound wisdom which the Court's holding in Powell vs Alabama rested.'——

The due process clause does not absolutely prohibit a State Court from accepting a plea of guilty from an uncounseled Defendant. (Bute vs Illinois (1948) 833 US 64, 92 L Ed 986, 68 S Ct 763; Townsend vs Burke (1948) 334 US 736, 92 L Ed 1690, 68 S Ct 1252.) Where the accused is fully advised of all the implications of such a plea and is capable of understanding them but persists in his desire to plead guilty. (Carter vs Illinois (1946) 329 US 173, 91 L Ed 172, 67 S Ct 216)

A plea of guilty does not conclusively or necessarily imply a waiver of the right to counsel (Rice vs Olson (1945) 324 US 786, 89 L Ed 1367, 65 S Ct 989)

The requirement of the Sixth Amendment in a Federal Court applicable to the assistance of counsel in a criminal proceeding applies to conviction following either pleas of guilty and pleas of not guilty. (Dissenting opinion of Black, J., joined by Douglas, Murphy and Rutledge, JJ., in Foster vs Illinois (1947) 332 US 134, 91 L Ed 1955, 67 S Ct 1716).

The accused must have legal assistance as a matter of due process, irrespective of whether he contests a charge against him or pleads guilty. (Townsend vs Burke (1948) 334 US 736, 92 L Ed 1690, 68 S Ct 1252; Uveges vs Pennsylvania (1948) 335 US 437, 93 L Ed 127, 69 S Ct 184)

The Petitioner in this case has claimed denial of due process under the Constitution of the United States, by

trial Court's failure to afford or offer counsel "prior to or during the trial". (R. I, p. 23, 24 & 25; 400 SW 2d 956) The broad question of the right to counsel includes "The right to be informed by the trial Court of such right and to be offered counsel. (De Meeler vs Michigan (1947) 329 US 663, 91 L Ed 584, 67 S Ct 596; Uveges vs Pennsylvania (1948) 335 US 437, 93 L Ed 127, 69 S Ct 184) and the right is denied when the trial Court refuses, (Powell vs Alabama (1932) 287 US 45, 77 L Ed 158, 53 S Ct 55, 84 ALR 527) or merely fails (Williams vs Kaiser (1945) 323 Us 471, 89 L Ed 398, 65 S Ct 363) to act thereon."

Petitioner showed in his point of error before the Court of Civil Appeals that ". . . Appellant was not advised of his right to legal counsel to represent him . . ." (40 SW 2d at 956; R. II, p. 2; Appendix, Exhibit C, p. 6a, 7a)

> "Where denial of the constitutional right to assistance of counsel is asserted, its peculiar sacredness demands that the Supreme Court scrupulously review the record." (Avery vs Alabama (1940) 308 US 444, 84 L Ed 377, 60 S Ct 321).

2. Since the right to counsel has been held an essential jurisdictional prerequisite in Federal criminal trials should not that jurisdictional prerequisite also apply in the criminal trials of State Courts?

3. When a man collaterally attacks the judgment of a lower Court—by pleading failure of the lower Court to afford or offer counsel in his verified but uncontroverted and undenied pleadings—is not the judgment of the lower Court void for the lack of jurisdiction?

The Court of Civil Appeals held against Petitioner in the following language:

"In our opinion the County Court judgment was not void" (400 SW 2d at 956, R. II, p. 3, Appendix, Exhibit C, p. 9a)

ESSENTIAL JURISDICTIONAL PREREQUISITE:

In Federal Courts denial of the right to the assistance of counsel, or failure of accused to waive that right, or failure of the lower Court to afford counsel has been held an essential jurisdictional prerequisite. This was made clear in the opinion of Mr. Justice Black in the case of Johnson vs Zerbst (1938) 304 US 458, 82 L Ed 1461 at 1468, 58 S Ct 1019, 146 ALR at p. 363, 364.

> "Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an *essential jurisdictional prerequisite* to a Federal Court's authority to deprive an accused of his life or liberty .... If the accused, however, is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a *jurisdictional bar* to a valid conviction depriving him of his life or liberty. A Court's jurisdiction at the beginning of the trial may be lost" in the course of the proceedings "due to failure to complete the Court—as the Sixth Amendment requires—by providing counsel for an accused who is unable to obtain counsel, who has not intelligently waived this Constitutional guaranty, and whose life or liberty is at stake. (Frank vs Margum, 237 US

327, 59 L Ed 980, 35 S Ct 582) If this requirement of the Sixth Amendment is not complied with, the Court no longer *has jurisdiction to proceed.* The judgment of conviction pronounced by a Court without jurisdiction is *void* . . ." (emphasis added)

The right to counsel has also been considered an essential jurisdictional prerequisite in the following cases: United States vs Morgan (1954) 346 US 502, 98 L Ed 248, 74 S Ct 247; Van Moltke vs Gillies (1948) 332 US 708, 92 L Ed 309, 68 S Ct 316; Behrens vs Hironimus, C.C.A. W.Va. (1948), 166 F 2d 245; Kuczynski vs U.S., C.C.A. Ind. (1945), 149 F 2d 478; Nobler vs Eicher, (1944), 143 F 2d 1001, 79 US App DC 217; Thompson vs King, C.C.A. Mo., (1939), 107 F 2d 307; U.S. vs Levine, D.C. Mass. (1955), 127 F Supp. 651; Bagless vs Johnston D.C. Cal., (1943), 88 F Supp. 758; Nortner vs Hiatt, D.C. Pa., (1940), 33 F Supp. 545.

AVAILABILITY OF COLLATERAL ATTACK:

A conviction in a criminal proceeding in which the right of an accused to the assistance of counsel has been denied in violation of due process is void and subject to collateral attack. (Rice vs Olson (1945) 324 US 786, 89 L Ed 1367, 65 S Ct 989)

It has also been held that the absence of counsel at trial in a Federal Court renders a felony conviction subject to collateral attack. (Johnson vs Zerbst (1938) 304 US 458, 82 L Ed 1461, 58 S Ct 1019, 146 ALR 357)

In 1948, 93 L Ed 148 in Anno.—Right to Counsel it is stated,

> "... it is now well settled that the violation of an accused's right to counsel, although specifically guaranteed by the Sixth Amendment in Federal prosecutions only, renders a conviction in a state criminal proceeding void and subject to collateral attack, where such violation infringes upon due process. (Hawk vs Olson (1945) 326 271, 90 L Ed 61, 66 S Ct 116; Gibbs vs Burke (1949) 337 US 773, 93 L Ed (Adv 1343), 69 S Ct 1247) . . ."

Is it not logical that since the decision of Gideon vs Wainwright (372 US 335, 9 L Ed 2d 799, 83 S Ct 792, 93 ALR 2d 733); making the Sixth Amendment provision of right to counsel obligatory on the States by the Fourteenth Amendment, that a State Court failing to advise the accused of the right to counsel and without his waiver thereof, has denied the accused due process, that the judgment of said Court is void for lack of jurisdiction, and the judgment should be subject to collateral attack?

CLAIM OF DENIAL OF COUNSEL BY VERIFIED BUT UNCONTROVERTED AND UNDENIED PLEADINGS:

Petitioner by his verified pleadings showed that he was not "Offered legal counsel to represent him, nor was he afforded legal counsel prior to or during trial in said cause." Petitioner further claimed in his point of error, ". . . that Appellant was not advised of his right to counsel." (400 SW 2d at 956; R. II, p. 2, Appendix C, p. 7a)

In Rice vs Olson (1945) 324 US 786, 89 L Ed 1367, Mr. Justice Black in the opinion of the Court stated:

> "Whatever inference of waiver could be drawn from the Petitioner's *plea of guilty* is adequately answered by the *uncontroverted statement* in his Petition that he did waive the right either by word or action. This denial of waiver squarely raised the question of fact." (emphasis added)
>
> "A Defendant who pleads guilty is entitled to the benefit of counsel, and a request for counsel is not necessary." (89 L Ed at 1369)

In the Rice case the Petitioner "Challenged the validity of the judgment'. . .'on the ground that, in violation of the Fourteenth Amendment, he had been deprived of due process of law in that the trial Court failed to advise him of his constitutional rights to counsel and call witnesses." (ibid., 89 L Ed at 1368, 1369)

The opportunity is presented in this case for the Supreme Court to decide a question not heretofore passed on, namely: Since the right to counsel is an essential jurisdictional prerequisite of Federal criminal trials should not that prerequisite also apply to criminal trials in State Courts?

There is also involved the question, which is undecided: Should not the judgment of a State Court be subject to collateral attack in a criminal trial in which an accused has been denied the assistance of counsel—in violation of due process making the judgment of the State Court void?

In this case there is also the question of a State Court holding contrary to the Supreme Court: i.e., the uncontroverted and unanswered verified pleading

of Petitioner that he was not afforded counsel or offered counsel which raised a question of fact.

4. Should not a misdemeanant in a State criminal trial be afforded or offered the right to counsel when his liberty was at stake and as a result of his non-intelligent and un-informed plea of guilty his license to practice and instruct in hairdressing and cosmetology was thereby revoked by the State Board of Hairdressers and Cosmetologists?

RIGHT TO COUNSEL EXTENDED TO MISDEMEANANTS:

On January 12, 1965, the United States Circuit Court of Appeals, Fifth Circuit held in Harvey vs Mississippi, 340 F 2d 263 at 271,

> "The failure of notice to Harvey (a Defendant in a misdemeanor case) of his right to the assistance of counsel invalidated his guilty plea and rendered his conviction and incarceration constitutionally improper."

The appeal was based upon the contention that the conviction of the Appellant, Harvey, was void; because his plea of guilty was entered without the assistance of counsel, and without benefit of advice regarding his right to counsel.

Harvey had been convicted in a misdemeanor charge "Under the Mississippi statute punishable by a fine of up to $500. and up to 90 days in jail." (ibid., 340 F 2d at 264)

Chief Judge Tuttle, of the Fifth Circuit, in the Court's opinion on the Harvey case (ibid., 340 F 2d

271) discussed the application of the right to counsel in a misdemeanor case, as follows:

> "In Evans vs Rives, 1942, 75 U.S. App. D.C. 242, 126 F 2d 633, a case involving a federal misdemeanor, the Court stated:
>
> 'It is . . .suggested. . . that the constitutional guaranty of the right to the assistance of counsel in criminal case does not apply except in the event of 'serious offenses.' No such differentiation is made in the wording of the guaranty itself, and we are cited to no authority, and know of none, making this distinction. The purpose of the guaranty is to give assurance against deprivation of life or liberty except strictly according to law. The Petitioner would be as effectively deprived of his liberty by a sentence to a year in jail for the crime of non-support of a minor child as by a sentence to a year in jail for any other crime, however serious. And so far as the right to the assistance of counsel is concerned, the Constitution draws no distinction between loss of liberty for a short period and such loss for a long one." 126 F. 2d at 638.

and Chief Judge Tuttle followed, Gideon vs Wainwright, as follows:

> "While the rule as thus stated has never been expressly extended to misdemeanor charges in state tribunals, it has been argued that such a principle is implicit in the Supreme Court's decision in Gideon vs Wainwright, 1963, 372 U.S. 335, 83 S. Ct. 792, 9 L Ed. 2d 799. 93 A.L.R. 2d 733."

In Gideon vs Wainwright (1965) 372 US 335, 9 L

Ed 2d 799 at 808, 83 S Ct 792, 93 A.L.R. 2d 733. Mr. Justice Clark in his opinion concurring in the results stated:

> "I must conclude here as in Kinsella (Kinsella vs United States, (1960) 361 US 234, 4 L Ed 2d 268, 80 S Ct 297) that the Constitution makes no distinction between capital and non capital cases. The Fourteenth Amendment requires due process of law for the deprival "of liberty", just as for the deprival of "life", and there cannot constitutionally be a difference in the quality of the process based merely upon the sanction involved. How can the Fourteenth Amendment tolerate a procedure which it condemns in capital cases on the grounds that deprival of liberty may be less onerous than deprival of life—a value judgment not universally accepted—or only that the latter deprival is irrevocable? I can find no acceptable rationalization for such result, and I therefore concur with the judgment of the Court."

The distinction between capital and non-capital cases does not furnish a valid basis for deciding when to appoint counsel. (Hamilton vs Alabama, 368 US 52, 7 L Ed 2d 114, 8 Sup Ct 157; Uveges vs Pennsylvania, 335 US 437, 441; 93 L Ed 127; 693 S Ct 184; Ferguson vs Georgia, 365 US 570; 5 L Ed 2d 738, 81 S Ct 756; Griffin vs Illinois, 351 US 12, 100 L Ed 891 76 S Ct 585, 55 A.L.R. 2d 1055)

NEED OF DEFENDANT FOR COUNSEL:

Mr. Justice Black, in expressing the opinion of seven members of the Supreme Court in the Gideon

case (Gideon vs Wainwright, 372 US 355, 9 L Ed 2d 799 at 805, 806, 83 S Ct 792, 93 A.L.R. 2d 733) stated:

> "A Defendant's need for a lawyer is nowhere better stated than in the moving words of Mr. Justice Sutherland in Powell vs Alabama: (1932) (287 US 45, 77 Led 158, 53 S Ct 55, 84 A.L.R. 527)."
>
> > "The right to be heard would be in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge to adequately prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceeding against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." (287 US at 68, 69.)

It is noted from the above that no distinction is made in Mr. Justice Sutherland's analysis of the need for counsel between an indigent and a rich man or the difference between an intelligent, educated layman and an un-intelligent and un-educated layman.

It would seem that need for counsel should apply to all alike—assuming one is untrained in the law. In this case the Petitioner does not claim to be an indigent (although a man of modest means), but he does claim to be a man untrained in the law. (400 SW 2d 954, at 956; R. I, p. 23, R. II, p. 2; Appendix C, p. 7a) It would also seem that the right to be informed of the right to counsel should be applied to all, alike—not depending on one's intelligence or education, or upon one's financial status.

The opportunity is directly presented in this case for the Supreme Court to decide this question not heretofore passed on, but left open in Gideon vs Wainwright:

> "A basic question not yet clearly resolved by the Court is whether the Fourteenth Amendment requires a State to appoint counsel to defend an accused charged with a minor offense. The Gideon case; in which the Court overruled contrary to precedent and held that the Fourteenth Amendment makes applicable to the States the Sixth Amendments' guaranty of the right to counsel, involved a felony, but the Court spoke of indigents 'charged with a crime' rather than indigents charged with felonies." (Anno: Right to Counsel, 9 L Ed 2d at 1261)

5. Can there be an intelligent waiver of right to counsel—implied by a plea of guilty—when made by a man untrained in the law and without an apprehension of all other facts essential to a broad understanding of the whole matter?

6. When a judgment in a criminal case recites that

Appellant "After being duly admonished of the consequences * by the Court, pleaded guilty to the charged", does that infer the right to counsel had been offered or afforded or that there had been an intelligent waiver of the right?**

PRESUMPTION AGAINST WAIVER OF CONSTITUTIONAL RIGHTS: Mr. Justice Black in delivering the opinion of the Court in Johnson vs Zerbst, (1938) (304 US 458, 82 L Ed 1461 at 1466), stated:

> "It has been pointed out that 'Courts indulge every reasonable presumption against waiver' of fundamental constitutional rights, (Aetna Ins. Co. vs Kennedy, 301 US 389, 393, 81 L Ed 1177, 1180, 57 S Ct 809; Hodges vs Easton, 106 US 408, 412, 27 L ed 169, 171 a S Ct 307) and that we 'do not presume acquiesence in the loss of fundamental rights.' (Ohio Bell Telephone Co. vs Public Utilities Co., 301 US 292, 307, 81 L Ed 1093, 1103, 57 S Ct 724) A waiver is ordinarily an intentional relinquishment, or abandonment of a known right or privilege. The determination of whether there had been an *intelligent waiver*, of the right to counsel, must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." (*emphasis added*)

TO BE EFFECTIVE WAIVER OF RIGHT TO COUNSEL—

1. must be made understandingly. (Uveges vs Pennsylvania, (1948) 335 US 437, 93 L Ed 127, 69 S Ct 184)

2. must be made intelligently, completely and voluntarily, (Bute vs Illinois, (1948) 333 US 640 92 L Ed 986, 68 S Ct 763)

3. must be made in the exercise of free choice, in the considered approval of the Court, (van Moltke vs Gillies, (1948) 332 US 708 92 L Ed 309, 68 S Ct 316)

4. must be made with an apprehension of all other facts essential to a broad understanding of the whole matter. (Van Moltke vs Gillies, (1948) 332 US 708 92 Led 309, 68 S Ct 316)

In Carnley vs Cochran, (1962) 369 US 506, 8 L Ed 2d, 82 S Ct 884 it was held:

> ". . .the assistance of counsel unless intelligently and understandingly waived by him, was a right guaranteed him by the Fourteenth Amendment.
>
> We must therefore consider whether Petitioner did intelligently and understandingly waive the assistance of counsel. The record does not show that the trial judge offered and the Petitioner declined counsel. C. J. Moore vs Michigan, 355 US 155, 160, 161, 2 L Ed 2d 167, 171, 172; 78 S Ct 191." (8 L Ed at 75) "But it is settled that the right to counsel does not depend upon a request," (ibid 8 L Ed 2d at 75, note 8) "For this reason, there is no occasion to hold a hearing in this case to settle the fact issue raised by the Petition and return as to whether the Petitioner requested counsel . . . . We hold that when the Constitution grants protection against criminal proceedings without the as-

sistance of counsel, counsel must be furnished 'whether or not the accused requested the appointment of counsel.' Uveges vs Pennsylvania, 335 US 437, 411. 365 US at 111, note 1; Rice vs Olson 324 US at 788; Gibbs vs Burke 337 US at 780." (ibid., 8 L Ed 2d at 76)

It is the duty of the Judge of the Trial Court to determine if there has been a waiver and the determination should appear on the record.

"The Constitutional right of an accused to be represented by counsel invokes of itself, the protection of the Trial Court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the Trial Judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the Trial Court, and it would be fitting and appropriate for that determination to appear upon the record." (ibid., 8 L Ed 2d at 76, 77)

It was also held that the presumption against waiver of right to counsel applies in State criminal proceedings.

"We have held the principles declared in Johnson vs Zerbst equally applicable to asserted waivers of the right of counsel in State criminal proceedings. In Rice vs Olson (324 US 786; 89 L Ed 1367, 65 S Ct 989), the Petitioner had pleaded guilty to a burglary charge. He did not claim that he had requested counsel, but alleged that he had not been advised of his right to assistance of

> counsel and that he had not waived that right". (ibid 8 L Ed 2d at 77)

Petitioner asserted in his verified pleading which was unanswered and uncontroverted that:

> ". . .Plaintiff is not an attorney and did not know ALL of the consequences of said conviction . . . ." (*emphasis added*)

he also asserted that he was not

> ". . .advised as to the consequences of his conviction in said cause. . . ." (400 SW 2d at 956, R. I, p. 23; R. II, p. 2)

Is it not apparent that Petitioner pleaded guilty due to his ignorance of the law—his ignorance of the end result—that he would lose his license to do business?

As well stated in Johnson vs Zerbst, (304 US 458, 82 L Ed 1467, 58 S Ct 1019, 146 A. L. R. at 362):

> "*The purpose of the constitutional guaranty of a right to counsel is to protect the accused from a conviction resulting from his own ignorance* of his legal and Constitutional rights, and the guaranty would be a nullity by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution." (*emphasis added*)

The Court of Civil Appeals, in its judgment stated:

> "The judgment of conviction of the County Court at Law is valid on its face and does not disclose the alleged defect urged by Appellant. The judgment recites that Appellant

*'After being duly admonished of the consequences*** by the Court, pleaded guilty to the charge***."* (emphasis added; 400 SW 2d at 956, Appendix C, p. 8a)

The aforesaid judgment of the County Court at Law may be found in Appendix A, p. 2a, R. I, p. 13. This judgment was entered on a printed form used by the Court.

Can it be inferred from the printed judgment form used by the County Court that the words *"After being duly admonished of the consequences***by the Court, pleaded guilty to the charge***"* (emphasis added) (R. I, p. 13, Appendix A, p. 2a) that:

A. Petitioner was informed of his right to counsel?

B. Petitioner was advised of his right to counsel or afforded counsel prior to or during the trial?

C. Petitioner made an intelligent waiver of his right to counsel?

D. Petitioner was informed by the Court that his plea would be used by the State Board to revoke his license to instruct in and practice hairdressing and cosmetology and that thereby he would lose his means of livelihood?

It follows that Petitioner's conviction upon his plea of guilty—without benefit of counsel constitutes a serious deviation from the established principles of due process of law within the meaning of the Sixth and Four-

teenth Amendments to the Constiution of the United States of America.

CONCLUSION

For the foregoing reasons, Petitioner prays that a Writ of Certiorari issue to the Court of Civil Appeals, Eleventh Supreme Judicial District of Texas.

Respectfully submitted,

DAN M. FERGUS,
P. O. Box 1479
Abilene, Texas 79604

H. L. HAYS, JR.
P. O. Box 5025
Abilene, Texas 79605

ATTORNEYS for PETITIONER

APPENDIX

(Exhibits A Through E)

A. Judgment of the County Court at Law, Taylor County, Texas.

B. Judgment of the District Court of Taylor County, 104th Judicial District of Texas.

C. Opinion of the Court of Civil Appeals, Eleventh Supreme Judicial District of Texas.

D. Judgments affirming Judgment of Trial Court and overruling Appellant's Motion for Rehearing by the Court of Civil Appeals.

E. Application for Writ of Error, refused, and Order overruling Petitioner's Motion for Rehearing, by the Supreme Court of Texas.

EXHIBIT A

Be it Remembered That on Monday the 20th day of April 1964, there came on and was held a Regular Term of the Honorable County Court at Law of Taylor County, Texas, at the Court House of said County, in Abilene; present and presiding the Hon. James K. Graham Judge; Court at Law James Jeffrey County Attorney; Mrs. Chester Hutcheson County Clerk, and J. D. Woodard Sheriff, when the following proceedings; among others were had, viz:

THE STATE OF TEXAS vs. EUGENE MONROE VANCE	IN COUNTY COURT AT LAW TAYLOR COUNTY May 21, 1964

Charge: Possession of lewd literature
No. 10,158
Date April TERM A.D. 1964

This day this cause was called for trial, and both parties appeared and announced ready for trial, and the defendant Eugene Monroe Vance *after being duly admonished of the consequences thereof by the Court, pleaded guilty to the charge herein,* and waived a trial by jury and submitted his cause to the Court. Wherefore it is considered by the Court, that the defendant is guilty as charged, and his punishment is assessed at a fine of One Hundred and No/100 Dollars.

It is therefore considered and adjudged by the Court, that the State of Texas do have and recover of the defendant the fine of One Hundred and No/100 Dollars and all costs of this prosecution* *and commitment is ordered issued, and the defendant being present in the Court is placed in custody of the Sheriff—who will commit him forthwith to the jail* of said County—until said fine and costs are fully paid. It is further ordered that execution may issue against the property of said defendant for the amount of said fine and costs. (*emphasis added.*)

James K. Graham, Judge
Court at Law
Taylor County, Texas

EXHIBIT B

No. 10,282-B

EUGENE MONROE VANCE VS STATE BOARD OF HAIRDRESSERS AND COSMETOLOGISTS	IN THE DISTRICT COURT OF TAYLOR COUNTY, TEXAS 104TH JUDICIAL DISTRICT

JUDGMENT

On June 11, 1965, came on to be heard the Motion of Defendant, State Board of Hairdressers and Cosmetologists, for Summary Judgment; and came on the Motion of Plaintiff, Eugene Monroe Vance, for Summary Judgment; and came the Plaintiff, in person and by and through his attorneys of record, and came the Defendant, by and through the Attorney General of Texas; and the Court having considered the pleadings, affidavits, and other documents on file, and having heard argument of counsel thereon, is of the opinion that the matter should be decided as hereinafter set forth:

It is, accordingly, ORDERED, ADJUDGED and DECREED that the Motion for Summary Judgment of Defendant, State Board of Hairdressers and Cosmetologists, be in all things GRANTED, and that the said Board's Order of February 4, 1965, revoking Plaintiff's licenses to instruct and practice cosmetology in the State of Texas be in all things SUSTAINED.

The Motion for Summary Judgment of Plaintiff Eugene Monroe Vance is hereby DENIED.

Costs of court herein are assesed against Plaintiff, for which let execution issue.

To which judgment, orders and rulings of the Court, Plaintiff, Eugene Monroe Vance, in open court duly and timely excepted and gave notice of appeal to the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas, at Eastland.

RENDERED, ENTERED and SIGNED this 10th day of June, 1965.
June, 1965.

OWEN THOMAS
District Judge

APPROVED AS TO FORM ONLY:

WAGGONER CARR
ATTORNEY GENERAL OF TEXAS

By.....
Malcolm L. Quick, Assistant

ATTORNEYS FOR DEFENDANT, STATE BOARD OF HAIRDRESSERS AND COSMETOLOGISTS

DAN. M. FERGUS
Attorney at Law

H. L. HAYS, JR.
Attorney at Law

ATTORNEYS FOR PLAINTIFF, EUGENE MONROE VANCE

Recorded: Vol. N, Page 584, Civil Minutes of the 104th District Court, Taylor County, Texas.

EXHIBIT C

Eugene Monroe Vance,
Appellant

vs. No. 4027

STATE BOARD OF
HAIRDRESSERS AND
COSMETOLOGISTS,
Appellee

Appeal from the 104th District Court of Taylor County.

Eugene Monroe Vance brought this suit in the District Court against the State Board of Hairdressers and Cosmetologists to set aside an order of the Board revoking plaintiff's licenses to practice and instruct in hairdressing and cosmetology. Both plaintiff and defendant filed motions for summary judgment. The defendant's motion was granted and judgment was entered upholding the defendant's administrative order revoking the cosmetology licenses held by plaintiff.

Section 10(c) of Article 734b, Vernon's Tex. Penal Code, provides in part as follows:

> "The Board may refuse to issue or to renew or may suspend or revoke any license issued in accordance with the provisions of this Act for the following reasons:
>
> (c) Conviction of any misdemeanor involving immoral conduct."

The record shows that Eugene Monroe Vance on May 21, 1964, entered a plea of guilty and was con-

victed in the County Court at Law of Taylor County of the offense of possessing lewd literature in violation of Article 527 of Vernon's Texas Penal Code. The record further shows that as a result of a hearing held on January 29, 1965, in compliance with Article 734b of Vernon's Texas Penal Code, appellee, State Board of Hairdressers and Cosmetologists, made the following findings and order:

> "1. That Eugene Monroe Vance, holder of Instructor's License No. 773 and Operator's License No. 65-53245, is the same person who was convicted of possession of lewd literature in No. 10,158 in the County Court at Law in Taylor County on May 21, 1964.
>
> 2. That possession of lewd literature is a misdemeanor involving immoral conduct as prescribed by Section 10 (c), Article 734b.
>
> ORDER OF THE BOARD
>
> Pursuant to the hearings and findings above made, it is the order of the Texas State Board of Hairdressers and Cosmetologists that instructor's License No. 773 and Operator's License No. 65-53245, issued to Eugene Monroe Vance be, and are hereby, revoked by virtue of the authority vested in the Board by Section 10(c), Article 734b."

Upon an appeal to the 104th District Court of Taylor County, the court, after hearing, denied appellant's motion for summary judgment, and granted the the motion for summary judgment of appellee, State Board of Hairdressers and Cosmetologists.

Appellant presents one point of error in which he contends that:

> "The trial court erred in overruling appellant's motion for summary judgment, and in sustaining appellee's motion for summary judgment; because appellant's conviction in County Court at Law, Taylor County, Texas, was void in that appellant was not advised of his right to legal counsel to represent him prior to, and during the trial, nor was he advised as to the consequences of his conviction in said cause. All of which is in violation of the sixth and fourteenth amendments to the Constitution of the United States of America."

Appellant contends that the plea of guilty and judgment of conviction based thereon are nullities and absolutely void. In this connection, appellant filed at verified pleading in which he alleged:

> "Plaintiff would further show the Court that at not time prior to his supposedly conviction in Cause No. 10,158 of the County Court at Law, Taylor County, Texas, styled '*The State of Texas vs. Eugene Monroe Vance*', was he offered legal counsel to represent him nor was he afforded legal counsel prior to or during the trial in said cause, nor was he advised as to the consequence of his conviction in said cause and that the Plaintiff is not an attorney and did not know all of the consequences of said conviction and therefore, such conviction was invalid and completely void and the action taken by the Defendant in revoking his Instructor's License No. 773 and Operator's License No. 65-53245, was invalid and void and without any force and effect under the 6th and 14th Amendments to the Constitution of the United States of America."

Appellant also filed a supplemental answer to defendant's motion for summary judgment and a motion for summary judgment in his favor in which he alleged, concerning the judgment of conviction against him, that it:

> "...is invalid and void and without any force and effect because Eugene Monroe Vance was not offered legal counsel to or during the trial of said cause, nor was he advised as to the consequence of his conviction in said cause, in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States of America, as shown by Plaintiff's Second Supplemental Petition, sworn to by the plaintiff, on file herein, and made a part hereof for all purposes."

The judgment of conviction in the County Court at Law is valid upon its face and does not disclose the alleged defect urged by appellant. The judgment recites that appellant *"after being duly admonished of the consequences—by the court, pleaded guilty to the charge—"*. Appellant seeks to avoid the order of the State Board of Hairdressers and Cosmetologists by collaterally attacking in a civil court the criminal conviction rendered against him which is not shown to be invalid upon its face. *Such a collateral attack on that judgment is not permissible unless the judgment is void and not merely erroneous in such a way as to be voidable.* Texas Department of Public Safety vs Richardson, 384 SW 2d 128, (Sup. Ct.); Perry v. Copeland, 323 SW 2d 339; Ex parte Tyler, 152 Tex. 602, 261 SW 2d 833; Clayton v. Hurt, 88 Tex. 595, 32 SW 876; Martin v. Sheppard, 145 Tex 639, 201 SW 2d 810;

Heard v. State, 146 Tex. 139, 204 SW 2d 344. (*emphasis added.*)

In our opinion, the County Court judgment of conviction appellant was not void. The court, therefore, did not err in overruling appellant's motion for summary judgment and in granting the motion of appellee for a summary judgment. Appellant's point of error is overruled.

The judgment is affirmed.

CECIL C. COLLINS
ASSOCIATE JUSTICE

February 25, 1966.

STATE OF TEXAS,
COUNTY OF EASTLAND,

I, HOMER SMITH, Clerk of the Court of Civil Appeals in and for the Eleventh Supreme Judicial District of Texas, do hereby certify that the above and foregoing is a true and correct copy of the original opinion entered in the above styled and numbered cause, as the same appears now of record in my said office.

GIVEN under my hand and seal of office this the 29th day of August, 1966.

HOMER SMITH, CLERK

BY:.....
Oleta M. Moseley, Deputy Clerk

EXHIBIT D

EUGENE MONROE VANCE, vs. No. 4027 STATE BOARD OF HAIRDRESSERS AND COSMETOLOGISTS } FROM THE 104th DISTRICT Court of Taylor County. February 25, 1966

This cause came on to be heard on the transcript of the record and the same being inspected, it is the opinion of the Court that there was no error in the judgment. It is therefore ordered, adjudged and decreed that the judgment of the trial court be, and the same is hereby, in all things affirmed. It is further ordered that all costs incurred by reason of this appeal be, and the same are hereby, taxed against Eugene Monroe Vance, principal, and Dan M. Fergus and H. L. Hays, Jr., sureties on his appeal bond, for which let execution issue, and that this decision be certified below for observance.

EUGENE MONROE VANCE,
vs. No. 4027
STATE BOARD OF
HAIRDRESSERS AND
COSMETOLOGISTS

March 25, 1966

This day came on to be heard Appellant's motion for rehearing and the same, having been duly considered, is hereby overruled.

STATE OF TEXAS,
COUNTY OF EASTLAND,

I, HOMER SMITH, Clerk of the Court of Civil

Appeals in and for the Eleventh Supreme Judicial District of Texas, do hereby certify that the above and foregoing is a true and correct copy of all orders and judgments entered in the above styled and numbered cause, as the same appear now of record in my said office.

GIVEN Under my hand and seal of office this the 29th day of August, 1966.

HOMER SMITH, CLERK

BY:.....
Oleta M. Moseley, Deputy

EXHIBIT E

IN THE SUPREME COURT OF TEXAS

No. A-11,436 May 25, 1966

EUGENE MONROE VANCE,
vs.
STATE BOARD OF HAIRDRESSERS AND COSMETOLOGISTS
} FROM TAYLOR COUNTY, ELEVENTH DISTRICT

Application of petitioner for writ of error to the Court of Civil Appeals for the Eleventh Supreme Judicial District having been duly considered, it is ordered that the application be, and hereby is, refused.

It is further ordered that applicant, Eugene Monroe Vance, and sureties, Dan M. Fergus and H. L. Hays, Jr., pay all costs incurred on this application.

No. A-11,436 June 29, 1966

EUGENE MONROE VANCE,
vs.
STATE BOARD OF HAIRDRESSERS AND COSMETOLOGISTS

FROM TAYLOR COUNTY, ELEVENTH DISTRICT.

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, GEO. H. TEMPLIN, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and the seal of the Supreme Court of Texas, at the City of Austin, this the 5th day of July, 1966.

(SEAL)

GEO. H TEMPLIN, CLERK
BY s/ Jewell Seeliger, Deputy
Mrs. Jewell Seeliger

STATE OF TEXAS,
COUNTY OF EASTLAND,

I, HOMER SMITH, Clerk of the Court of Civil Appeals in and for the Eleventh Supreme Judicial

District of Texas, do hereby certify that the above and foregoing is a true and correct copy of the original order of the Supreme Court of Texas as received and filed in our Court on July 8, 1966.

GIVEN Under my hand and seal of office this the 29th day of August, 1966.

HOMER SMITH, CLERK
Court of Civil Appeals
Eleventh Supreme Judicial District
of Texas

BY:

Oleta M. Moseley, Deputy Clerk